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Supreme Court of the United States

October Term, 1941

No. 440

Appendices to Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

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APPENDIX I.

Opinion of the District Court of Appeal, Second Appellate District, State of California.

[Civ. No. 24244. Second Dist., Div. Two. May 5, 1960.]

City of San Marino, Plaintiffs and Appellants, v. The Roman Catholic Archbishop of Los Angeles (a Corporation) *et al.*, Defendants and Appellants.

[Civ. No. 23060. Second Dist., Div. Two. May 5, 1960.]

The People, *ex rel.*, City of San Marino, Respondents, v. The Roman Catholic Archbishop of Los Angeles (a Corporation), Appellants.

Appeal from judgments of the Superior Court of Los Angeles County, Kenneth C. Newell, Judge. Affirmed.

Actions for declaratory relief, in which was filed a cross-complaint for writ of mandamus to compel the reinstatement of building permits and the granting of a zoning variance, and for an injunction restraining the use of property in violation of a zoning ordinance. Judgments ordering reinstatement of building permit but denying issuance of variance, and granting injunction, affirmed.

Charles R. Martin, City Attorney (San Marino), and Dunlap, Holmes, Ross & Woodson for Plaintiffs and Appellants in Civ. No. 24244 and for Respondents in Civ. No. 23060.

C. M. Castruccio, Paul P. Selvin, Nimmer & Selvin for Defendants and Appellants in Civ. No. 24244 and for Appellants in Civ. No. 23060.

Fox, *P. J.* —These two cases have been consolidated for hearing on appeal. The controversy, broadly

speaking, centers around the uses defendants desire to make of their property located in the city of San Marino. One of these actions was brought by the city for declaratory relief. In that action defendants filed a cross-complaint for a writ of mandate. Both sides have appealed from different portions of the judgement. In the other suit, the city sought and obtained an injunction. Defendants have appealed.

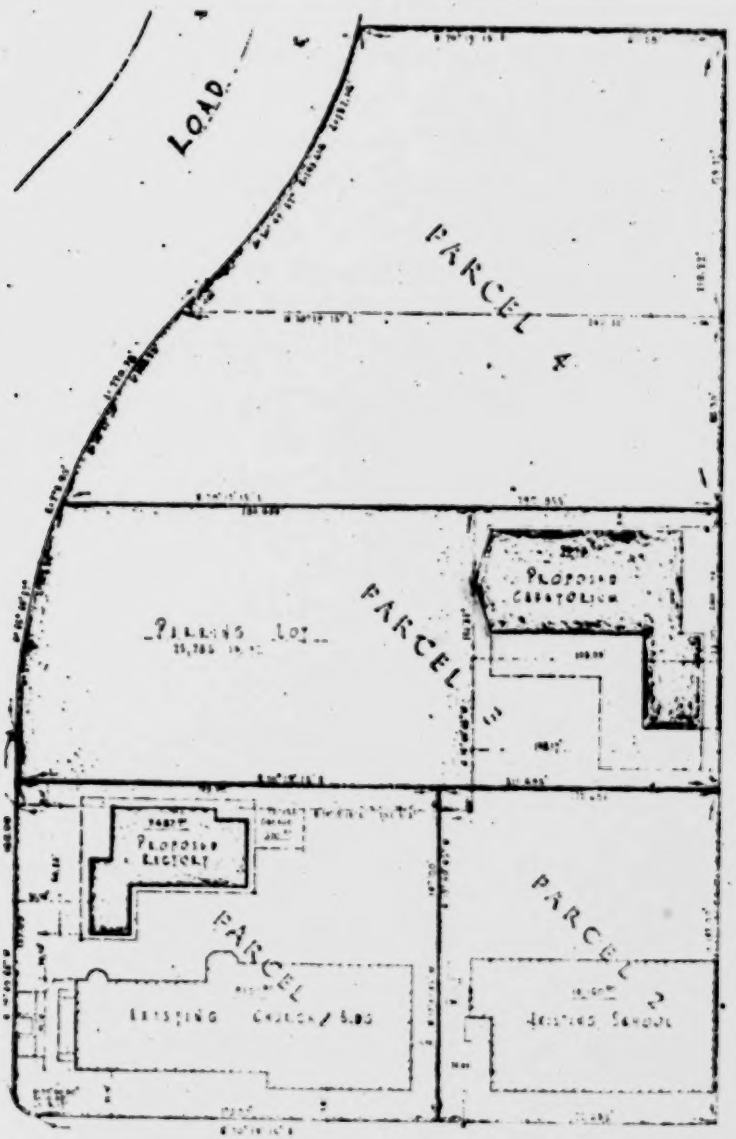
The first action (No. 24244) was instituted on September 13, 1956, by the city, seeking a construction of its off-street parking ordinance and a declaration of rights under certain building permits which had been issued to defendants. Defendants filed a cross-complaint and petition in this action by which they sought a writ of mandate to compel the granting of a zoning variance and the reissuance of the building permits mentioned above. A supplemental complaint was filed on December 20, 1957, by the city alleging that an ordinance passed since the filing of the original complaint had made the controversy regarding the building permits moot. Judgment was entered on June 19, 1959, ordering reinstatement of the building permits as prayed for in the cross-complaint. The city has appealed from this portion of the judgment. The judgment also denied defendants' petition for a writ of mandate to compel the issuance of a zoning variance, and from that portion of the judgment defendants appeal.

The injunction suit was brought by the city on May 3, 1957, to abate an alleged nuisance. Judgment on the pleadings was entered September 4, 1958, in favor of the city. Defendants have appealed.

In order to understand the location of the various parcels of property which are here involved, a perusal of the tract map reproduced* herein is recommended. There are two ommissions from the map as reproduced: (1) A nuns' residence situated on the north one-half of Parcel 4; and (2) the "Old Adobe" rectory situated on Parcels 1 and 2 north of the Church building and the school. Parcels 1, 2, and 3 are zoned C-1 and Parcel 4 is zoned R-1. The southern portion of Parcel 4 (below the horizontal line) is the property for which defendants seek a variance and will be hereinafter referred to as the "variance lot." This lot has no structures on it and is unpaved. Parcels 1, 2 and 3 will hereinafter be referred to as the "C-1 property."

The pertinent facts as found by the court in the first case and as pleaded by defendants in the injunction suit (which we must accept as true since judgment was rendered on the pleadings) are as follows: Defendants purchased the C-1 property totaling 2 acres in 1939. The variance lot was acquired in 1947, and the northern portion of Parcel 4 (nuns' residence) in 1954. In 1948, defendants built a new church as indicated on the map, and in 1950 they built the school. The variance lot has been used since its acquisition in 1947 as a parking lot on Sundays and Holy Days of Obligation, and has been used since 1950 as a playground for the children attending the school. There has been no attempt to conceal these activities. Defendants' monetary investment in the entire property exceeds $300,000. The membership of the church has grown from 150 in 1939, to approximately 3,000 at the time of these

*See map on following page.



actions. The school attendance has increased from 200 to 450. Without the use of the variance lot for the purposes of parking and recreation, there is insufficient space for these activities.

The background and chronology of the suits here involved are as follows: Soon after acquisition of the northern portion of Parcel 4 in 1954, defendants developed plans to improve their property by the construction of a new rectory on the C-1 property. Pursuant to this expansion program, on March 2, 1956, defendants applied for a zoning variance for the variance lot to allow its use as a parking lot and for recreational purposes. The city planning commission denied the application and the defendants appealed to the city council. After a hearing on July 11, 1956, the council sustained the ruling of the commission. Meanwhile, during the pendency of the application for the variance, defendants applied for a building permit for their proposed rectory. While this application was pending a conference was held between the city officials and representatives of the church, and a memorandum was prepared and signed by the parties embodying the results of said conference and stating the conditions upon which a permit for the rectory would be issued, one of which was that defendants dedicate a portion of their property as a parking area. In compliance with this requirement, defendants dedicated a major portion of Parcel 3, labeled "Parking Lot" (see map), as a parking area. This dedication was by way of deed which limited in perpetuity the use of the dedicated area to off-street parking. The deed, which was filed by the city on August 9, 1956, recites that it is given in consideration of the issuance to the defendants by the city of a building permit for the construction of the rectory. Such dedication is required by an ordinance of the city and was made on a form provided by the city. Prior to the issuance of any

permits, defendants let a building contract for the rectory. On August 10, 1956, the city issued two building permits to defendants. Permit Number 10495 was for the construction of a 5-foot high concrete block wall to separate Parcels 3 and 4 in accordance with the city's Ordinance 521 which requires a solid wall separating any parking lot from adjacent R-1 property (all of Parcel 4 is R-1). Permit Number 10496 was for the construction of the rectory building on Parcel 1 of the C-1 property. This permit contains the following condition: "Parish Rectory—Final inspection & Permit to *occupy* this building is withheld until the wall Permit No. 10495 is satisfactorily completed and accepted by the building inspector." (Emphasis added.) Following the issuance of these permits, and following the denial of the variance on the variance lot, a second conference was held between representatives of the parties. As a result of this conference, the building inspector determined that defendants did not intend to construct the required separation wall on the boundary between Parcels 3 and 4 and, therefore, the building inspector purportedly revoked the rectory permit (No. 10496) pending completion of the wall on or before October 1, 1956. The notice of revocation was in the form of a letter dated September 10, 1956, and the revocation was made without notice or hearing. The letter provided, *inter alia*, that ". . . until such wall is completed in full, your permit to construct a rectory will stand revoked, in a suspense file, to be reinstated only upon the order of the Building Inspector."

On September 13, 1956, the city filed the action for declaratory relief. The complaint alleged that the city

had interpreted its off-street parking ordinance (San Marino Zoning Ordinance, art. IX) to require that defendants construct the entire parking lot including the wall before a permit for the rectory could be issued. The defendants were alleged to have contended that completion of the parking lot and wall is not a condition precedent to the issuance of the rectory permit and the issue for determination was thus presented. The city added a new cause of action by way of supplemental complaint on December 20, 1957, in which it was alleged that on November 20, 1957, the city council adopted ordinance Number 601 amending the provisions of the zoning ordinance defining C-1 uses and reading in part: "No residential or other use permitted in an R-1 Zone, and no dwelling house, dwelling unit, living quarters, or housekeeping use shall be permitted in any C-1 Zone except upon a variance granted pursuant to Sections 23.31 *et seq.* of this Chapter." The city further alleged that the adoption of this ordinance made the permit controversy moot.

On January 4, 1957, defendants filed a cross-complaint and petition for writ of mandate. They allege that an agreement was entered into between the parties on January 24, 1956, whereby the city agreed to issue permits for the rectory and auditorium and for the parking lot on the performance by defendants of certain prerequisites. It was further alleged that defendants had fully complied with all the conditions, including an application for a variance on the variance lot, and in reliance upon the agreement, had contracted with a construction firm for the construction of the rectory and auditorium. Defendants prayed for the issuance of a writ of mandate to compel the approval of

the requested variance on the variance lot and for the reinstatement of the revoked building permit. The city made answer and return on February 5, 1957, and on May 13, 1957, a hearing was had on the limited question of the issuance of a writ of mandamus to compel the variance. An interlocutory decision was filed May 22, 1957, denying the writ.

Defendants' second amended answer to the complaint and supplemental complaint, filed July 25, 1958, alleged: (1) the recordation of the dedication deed; (2) the conditions for occupancy of the rectory as stated in the rectory permit; (3) that the revocation of the rectory permit was based upon a purported "anticipatory breach" by defendants of the parking lot wall requirement, and denied that there was any actual controversy regarding the interpretation of any staute or ordinance. The answer also alleged that the revocation of the rectory permit was unreasonable, unlawful, discriminatory and arbitrary and that the newly adopted Ordinance Number 601 has no retroactive effect, as against defendants.

A final hearing on this action was held on November 24, 1958, and judgment was entered June 19, 1959. The judgment ordered reinstatement of Permit Number 10496 (rectory) and prohibited use of the building until completion of the wall as provided in Permit Number 10495. The judgement also denied defendants' petition for issuance of a writ of mandate directing the granting of the variance, thus confirming the action of the council.

The city appeals from that portion of the judgment which commands it to reinstate the building permit for the rectory (Permit No. 10496). As to this part of

the judgment, the trial court found: "That prior to the issuance of said permits petitioners had (a) dedicated a portion of their C-1 property for off-street parking as required by Article IX, Section 23 of City's Municipal Code; (b) prepared and submitted plans and specifications for the rectory and parking area as required by said Code, and (c) had let a contract for the construction of said rectory. Said dedicated area was put to use for offstreet parking at the time of said dedication and such use has continued to date of trial." The court further found: "That permit No. 10496 was revoked without notice to petitioners and without any hearing on said revocation being held by City, that said revocation was arbitrary and unlawful"; and "That neither said permits nor Article IX of Chapter 23 of San Marino Municipal Code provide the time within which they are to be exercised except that permit No. 10496 provides that 'parish rectory—final inspection and permission to occupy this building is withheld until the wall permit No. 10495 is satisfactorily completed and accepted by the building inspector.'" The court also found: "That Ordinance No. 601 of City referred to in respondents' supplemental complaint does not act retroactively and by reason thereof does not affect any rights that had accrued to petitioner under permit No. 10496."

The city first argues that the lower court committed error in ordering reinstatement of the permit because the original rectory permit was improperly and prematurely issued. In this connection, the city contends that no valid permit for the construction of a new building on C-1 zoned property may be issued until a proper parking area adjacent to the proposed

building site has been constructed and approved. The city arrives at this conclusion by a construction of its zoning ordinance, and it now asks this court to adopt the same construction. Under the city's interpretation of the ordinance, the rectory permit was not validly issued by the building inspector since it was issued at the same time as the permit to build the parking lot wall. However, the provisions of the ordinance in question (art. IX entitled "Off-Street Parking") do not sustain the city's position. Section 23.46 thereof provides in part: ". . . no new building shall be constructed in the C-1 Zone . . . unless the *plans and specifications* therefor contain provisions for the parking of vehicles in accordance with the minimum requirements of this article." (Emphasis added.) The "minimum requirements" referred to above are set out in section 23.47 and the only requirement here pertinent is the 5-foot wall provision discussed *supra*. Section 23.48 provides for the required permit and reads in part: "Any person desiring or proposing to construct a new building in the C-1 Commercial Zone . . . shall apply to the city building inspector for a permit. They shall file with the inspector plans and specifications for the new building . . . and shall furnish evidence satisfactory to the inspector not only that the applicant owns or otherwise has available *sufficient property* to provide the minimum off-street parking required by this article, but also that such property has been *adequately restricted* for the parking of automobiles by a recorded deed, lease or agreement which shall be irrevocable until the building for which such parking area is an adjunct has been removed." (Emphasis added.) The clear mandate of this ordinance is the requirement that an area for off-street parking be allocated as an ad-

junct to new buildings on C-1 zone property. The only condition attached to the issuance of a building permit for the building to be constructed is that plans and specifications for a parking lot be submitted which will comply with the requirements of sections 23.47 and 23.48 of the ordinance, including a suitable amount of space and proper restrictions on the use of that space. The ordinance does not require, in express terms or by implication, that the parking area must be constructed and approved before the issuance of the permit for the construction of the new building. The building inspector therefore acted within his authority in issuing the rectory permit to defendants and such issuance was in every way valid and binding upon the city.

We come next to the question: Was the permit validly revoked by the city? As stated in Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal. App. 2d 776, at page 783 [194 P. 2d 148]: "It is not, nor could it be, claimed that a city council exercises unlimited discretion in the matter of revoking permits. A permit having issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. (Citing cases.)" But this is not to say that such revocation can be made without notice, hearing or the taking of evidence. The court made this point unmistakably clear when it said, at page 795: "A permit may not be revoked arbitrarily 'without cause.' (Citation.) It is conceded that in revoking the permit granted to appellant, the City Council of Santa Barbara did so without prior notice to appellant, without a hearing,

and without evidence. In determining that a permit, *validly issued*, should be revoked, the governing body of a municipality acts in a quasi-judicial capacity. In revoking a permit lawfully granted, due process requires that it act *only upon notice to the permittee upon a hearing, and upon evidence substantially supporting a finding of revocation.*" (Emphasis added.) With respect to the attempted revocation of the permit in the Trans-Oceanic case, the court held, at page 797: "The resolution or revocation . . . adopted without notice or hearing or reception of competent evidence, *was inoperative and of no legal force.*" (Emphasis added.)

As in the Trans-Oceanic case, it is conceded in this case that the rectory permit was "revoked" without prior notice and without a hearing. Therefore, since the permit was validly issued, the attempted revocation was a violation of due process and "was inoperative and of no legal force." (Trans-Oceanic Oil Corp. v. Santa Barbara, *supra.*) Furthermore, the attempted revocation of the permit by the building inspector by means of a letter to the defendants informing them that their permit would "stand revoked, in a suspense file" was a complete nullity. In New Mission Baptist Church v. City of Atlanta, 200 Ga. 518 [37 S. E. 2d 377], on substantially identical facts, the court held: "Nor could such permit be revoked by a mere exparte declaration of the inspector, as was sought to be done in his letter of July 19, and the attempted revocation being wholly void, the permit remained a force." It is therefore apparent that the rectory permit has never been revoked and remains in full force.

Nor may the city take comfort from its argument that the building inspector could validly revoke the permit because of an asserted "anticipatory breach"

by defendants of the terms and conditions of the permit. The facts constituting proof of an actual breach of conditions or of a clearly stated intention not to comply with the terms of a lawfully issued permit may only be determined upon a proper hearing before a duly constituted body. Until such time as these facts are presented to a proper tribunal of the city and that body has acted upon them, no valid revocation can be accomplished.

The city's argument that its subsequently enacted Zoning Ordinance Number 601 must be applied by this court even though we should find that the rectory permit was invalidly revoked is without merit. The city contends that even if the permit was invalidly revoked, it could not be ordered reinstated because it would now be in direct violation of the new ordinance. The complete answer to this contention is that the rectory permit was never properly revoked, is still in effect, and need not be reinstated. There is, therefore, no occasion to apply Ordinance Number 601.

In view of our conclusion that the attempted revocation of the rectory permit by the building inspector was invalid and void, we need not consider the question, extensively argued by counsel, as to whether or not defendants had acquired a vested interest in the permit.

The judgement must be affirmed in so far as it orders reinstatement of the rectory permit. Technically, no reinstatement is required since the permit has never been revoked. The effect of the court's order is simply to declare the validity of the permit.

We come next to a consideration of defendants' appeal from the judgement of the trial court denying

a writ of mandate directing the issuance of a variance for parking and recreation uses on the variance lot. The defendants application for a variance was made pursuant to sections 23.31 and 23.32 of the San Marino City Code which provide, *inter alia*: "When practical difficulties, unnecessary hardships, or results inconsistent with the general purposes of this chapter occur through a strict interpretation of the provisions of this chapter, the Planning Commission upon the verified application of any property owner, may in specific cases initiate proceedings for the granting of a variance under the provisions of this chapter, under such conditions as may be deemed necessary to assure that the spirit and purpose of this chapter will be observed, public safety and welfare secured, and substantial justice done. Before any variance or conditional permit may be granted, there shall be shown to the satisfaction of the Planning Commission that: (a) there are special circumstances attached to the property referred to in the application, or to the intended use of the property, which do not apply generally to other properties or class or uses in the same district and vicinity; (b) the granting of such variance will not result in material damage or prejudice to other property, nor be detrimental to the public welfare or injurious to the persons in the vicinity thereof; (c) all elements, taken together indicate that the property under consideration is unique and would otherwise be deprived of privileges enjoyed by other properties in the same district and vicinity."

Following a full hearing before the planning commission and a hearing de novo before the city council, the council denied the application. In their petition for a writ of mandate, and again on appeal, defend-

ants have urged that they sustained the burden of proof required by the above section of the city code in that: (1) They made a showing of substantial hardship which necessitated the requested uses of the variance lot; (2) they demonstrated "special circumstances" attaching to the variance lot which do not apply generally in the neighborhood; (3) there was no substantial showing of any detriment to the neighborhood which would result from the granting of the variance; and (4) the denial of a variance to defendants was an unreasonable discrimination.

The actions of a city in denying or granting a variance may not be successfully attached in the absence of a clear showing of abuse of discretion. (Otis v. City of Los Angeles, 52 Cal. App. 2d 605, 614, 615 [126 P. 2d 954]; Beverly Oil Co. v. City of Los Angeles, 40 Cal. 2d 552, 559 [254 P. 2d 865].) There is a presumption that all facts necessary to its decision have been found by the administrative board whose proceedings are under review. (Lindell Co. v. Board of Permit Appeals, 23 Cal. 2d 303, 323 [144 P. 2d 4].) Moreover, defendants must sustain the burden of establishing the existence of conditions that make the foregoing provisions of the San Marino City Code relating to variances applicable, for "it is manifest that failure to prove *any* of the matters required by the ordinance must result in a denial of a variance application." (Minney v. City of Azusa, 104 Cal. App. 2d 12, 38 [330 P. 2d 255].) (Emphasis added.)

In this connection, the trial court found: "At the hearing before the Council preceding its denial of petitioner's appeal referred to in Finding XXI, there was presented to said Council sufficient competent, sub-

stantial evidence to sustain the findings of the City Council that (1), there were no special circumstances attached to said variance property; (2) there were no special circumstances attached to the intended use of said property, to wit, automobile and bicycle parking and school recreational purposes, which did not and do not apply generally to other properties or classes or uses in the same district and vicinity; (3), the granting of the variance applied for by petitioner would result in material damage and prejudice to other property; (4) the granting of such variance would be detrimental to the public welfare and injurious to the persons in the vicinity thereof, and (5), that the denial of such requested variance will not deprive the variance property of privileges enjoyed by other properties in the same district and vicinity." The court further found that: "That variance lot could at the time of the denial of said variance by the City, and can now, be used for single-family residential purposes."

Defendants have not demonstrated any "unnecessary hardships" which would require the granting of the variance. The evidence reveals that the defendants purchased the variance lot subsequent to the enactment of the present zoning ordinances and that it was zoned R-1 at the time of purchase. Since then the lot has been consistently used, in violation of the zoning restrictions, for both parking and recreation. No doubt continued use of the variance lot for these purposes would be of great benefit to the defendants, but the fact remains that the lot was purchased with full knowledge of its restrictions, and furthermore, the expansion program undertaken by the defendants was promulgated in the face of those same restrictions. One

a site totaling little more than four acres, the defendants propose to construct a rectory and an auditorium, in addition to an existing church building which seats 750 persons, a school building which accommodates 450 students and a nuns' residence. On whatever space remains, defendants intend to park up to 150 cars and provide space for 450 children to play. The difficulty of this proposition is immediately apparent. Thus, while there is no doubt that some hardship exists, such hardship is the result, not of external circumstances, but of defendants' own expansion program. This is not enough to entitle defendants to relief. As this court recently pointed out, "Self-induced hardship is not within the purview of the ordinance. Only that type of hardship which inheres in the particular property is recognized,—such as inability to use it for purposes of its existing zoning caused by the prevailing uses of surrounding property . . . One who purchases property in anticipation of procuring a variance to enable him to use it for a purpose forbidden at the time of sale cannot complain of hardship ensuing from a denial of the desired variance." (Minney v. City of Azusa, *supra*, 164 Cal. App. 2d 12, 31, 32.) Thus the "self-induced" hardship complained of by defendants does not serve to bring them within the requirements of the city ordinance.

With respect to the claim of defendants that they have demonstrated "special circumstances" within the meaning of the zoning ordinance, the record reveals that the only substantial evidence presented by them to the council, tended to prove, not that the variance lot was unusable for residential purposes in an objective sense, but rather, that they did not *desire* to use it for such purposes. Furthermore, the record clearly reveals that

the variance lot could have been utilized by defendants as a site for their new rectory without the need for a variance. The mere fact that the defendants prefer to build their rectory on C-1 zoned property and use their R-1 property for parking cars and for recreational purposes does not demonstrate a "special circumstances" which requires the city to grant the privilege of a variance.

The next contention of defendants, viz., that there was no sufficient showing before the council that "material damage or prejudice" to other property in the neighborhood would result from the granting of the variance, is fully answered by reference to the transcript of the hearing. Several property owners testified that granting a variance would tend to decrease property values in the surrounding R-1 zone. There was evidence that noise, confusion and congestion would result from the use of the lot for recreation and parking. Moreover, the council took an independent "view" of the property and its environs and presumably based its decision in part on what was thus revealed. This was evidence which the council could properly take into account in arriving at its decision. (McCarthy v. City of Manhattan Beach, 4 Cal. 2d 879 [264 P. 2d 932]; Cantrell v. Board of Supervisors, 87 Cal. App. 2d 471 [197 P. 2d 218].) The finding of the trial court on this question is fully supported. It therefore follows that defendants have failed to show, as the ordinance requires, that the granting of the variance would not result in material damage or prejudice to other property in the vicinity.

In support of their contention that the denial of the variance was unreasonably discriminatory, defendants

point out that several variances had been granted by the city to other churches and business establishments in the immediate neighborhood. In their brief, defendants argue: "Defendants respectfully submit that this fact highlights the inequity of the present ruling of the City Council. In weighing whether or not the variance to defendants should be granted, the authorities must afford to defendants at least the same dignity and treatment as to shopping centers and business structures, and the authorities should not be permitted to grant variances to one religious establishments while withholding, in an obviously critical situation, a variance to defendants." This same argument was unsuccessfully advanced in County of San Diego v. McClurken, 37 Cal. 2d 683, the court holding at page 691 [234 P. 2d 972]: "The fact that variances may have been granted to some owners and denied to others, however, does not establish unreasonable discrimination. The granting or denial of variances rests largely in the discretion of the body designated by the zoning ordinance for that purpose, and a denial of a variance will not be disturbed in the absence of a clear showing of abuse of discretion." To the same effect are Minney v. City of Azusa, *supra*, page 33; and Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 341 [175 P. 2d 542].

In view of the foregoing, it is apparent that the trial court properly refused to grant the petition for a writ of mandate to compel the granting of the variance.

The second action (No. 23690), was filed by city in May, 1957. By its pleadings, the city sought an injunction to "abate a public nuisance and to enjoin viola-

tions . . . by defendants of Section 23.9 of the San Marino City Code." Since judgment was on the pleadings in this action it is necessary to summarize the essential allegations of the pleadings. The complaint alleged that defendants had caused or allowed violations of said ordinance by using the same for the parking of automobiles and for organized and supervised recreation and school activities in connection with defendants' school. The ordinance (§23.9) is set out in the complaint and it is apparent that the two described uses made by defendants are not included within the purview of the uses permitted by the section. It was further alleged that the cause of action for an injunction is authorized by section 23.53 of the San Marino City Code which provides for suits by the city to abate or enjoin unlawful uses of zoned property. The prayer was for a permanent injunction against further use in violation of the zoning laws.

Defendants' answer alleged: (1) That the city was estopped to enjoin the uses complained of because of the long-continued, open, and notorious use by defendants for these purposes; (2) that the city knew of the uses to which the property was put by defendants; (3) that the city knew that no one was damaged by such use and that no property value depreciation was caused by reason thereof; and (4) that the city knew that defendants had need of the space for the uses complained of because of substantial increases in both the number of parishioners and school children. The first portion of the answer concluded as follows: "That by reason of the said foregoing facts and circumstances and said unrestrained use of the said Parcel 25, (Variance lot) Plaintiff [city] is not entitled to any relief."

That any restraint by this court at this time would inflict unnecessary injury to said parishioners and school children and would invade private property beyond reasonable needs." The answer also alleged the pendency of the prior action (24344) and that a petition for a writ of mandate to compel the city to grant the variance was then before the courts in that by stipulation, defendants had the right to appeal from the denial of said writ by the interlocutory order of May 22, 1957. Defendants urge on appeal that said pleading sufficiently raises the defense of a prior action pending. On September 4, 1958, judgment on the pleadings was entered in favor of the city, enjoining defendants from further use of the variance lot as a parking or recreational area. Defendants appeal from this judgment.

There is no question that the uses being made of the lot are in violation of the ordinance and that the city has the right to seek an injunction to enforce the restrictions. The city argues that defendants admitted the cause of action in their answer in that they pleaded facts which showed the violation. The city further contends that no probative facts were pleaded in the answer which did more than admit the cause of action, and that all other allegations were mere conclusions of the pleader. If no controverted issue appears by the pleadings, motion for judgement on the pleadings should be granted. (White v. Jacobs, 204 Cal. 334, 336 [267 P. 1087].) If the pleadings admit the cause of action pleaded, motion for judgment on the pleadings should be granted. (Phillips v. Mathews, 90 Cal. App. 2d 161, 164 [202 P. 2d 798].)

Defendants urge (1) that a proper defense of estoppel was clearly pleaded and that estoppel is a question

of fact; (2) that equitable defenses were set up by the answer which could only have been determined by a trial on the merits; and (3) that in any event, a prior action (No. 24244) was pending on the same issues and that such prior action was pleaded.

On the point of estoppel, defendants' answer avers that: The variance lot has been used for parking since 1947; that the city knew of this use; that the city knew no one was damaged by virtue of any depreciation because of this continued use; that the city knew of defendants' need of recreational area for the school and of the increase in the school attendance; and, that the city knew that defendants' property was inadequate in size to meet its requirements unless the variance lot was so used. However, the city asserts that these pleadings show no affirmative duty on its part to act and no reliance by defendants upon any such failure to act. The basis of estoppel is that the party against whom the estoppel is asserted, "must have, by his conduct, misled another to his prejudice so that it would be a fraud on the latter to allow the true facts to be proved." (8 Cal. Jur. 2d 405.) In this connection, defendants do not contend that the provisions of the city's zoning ordinance concerning suits to enjoin illegal use of zoned property are mandatory in their operation. Thus no affirmative duty on the part of the city to act was pleaded. Moreover, long-continued but illegal use of property, without more, creates no vested rights in the owner as against the zoning provisions. (Acker v. Baldwin, 18 Cal. 2d 341, 346 [115 P. 2d 455].) In Donovan v. City of Santa Monica, 88 Cal. App. 2d 386 [199 P. 2d 51], an injunction granted to the city of Santa Monica was upheld even though the violations of the city zoning ordi-

nances which were thereby enjoined had continued for 20 years. The opinion quotes 119 American Law Reports, page 1511 as follows: "'It has been held that the mere fact that, without more, city officials fail to enforce a zoning ordinance against a violator will not estop the city from subsequently enforcing it against him.'"

Our Supreme Court recently had occasion to clearly define the rules of equitable estoppel as applied to municipalities. "There are occasions for departure from the general rule that a city may not be estopped by the conduct of its officers or employees. (Citation.) But such departure is justified only when the facts clearly establish that a grave injustice would be done if an equitable estoppel were not applied. (Citation.) . . . Certain conditions are necessary as the basis for an estoppel; the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of the facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and the other party must rely on the conduct to its prejudice. (Safway Steel Products, Inc. v. Lefever, 117 Cal. App. 2d 489, 491 [256 P. 2d 32].)" (California Cigarette Concessions, Inc. v. City of Los Angeles,[1] 53 Cal. 2d—[3 Cal. Rptr. 675, 350 P. 2d 715].)

Clearly, no showing of a lack of knowledge regarding the applicable restrictions on the use of the variance lot is pleaded in behalf of the defendants. Nor is there an allegation that the city by its acquiescence intend-

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[1]Advance Report Citation: 53 A. C. 870, 874.

ed the defendants to rely upon such inaction. It is apparent therefore, that the answer wholly failed to raise the issue of estoppel and that the facts pleaded in an attempt to invoke that doctrine did nothing more than admit the violations sought to be enjoined.

Defendants' second point is that drastic hardship would flow from a permanent injunction and that the issuance of the injunction would not be "reasonably related to the public health, safety, morals, or general welfare of said community, in view of all the facts and circumstances alleged." Defendants contend that this equitable defense was valid and that no determination could be made upon it as a matter of law on a motion for judgment on the pleadings. Defendants argue that: "In equity on application for an injunction a balancing of the hardships and a judging on the entire record is required, whether or not estoppel is present." This principle is not of universal application. Our courts will "balance the hardships" in cases involving encroachments or permanent trespasses to land where a mandatory injunction is sought. (Christensen v. Tucker, 114 Cal. App. 2d 554, 562 [250 P. 2d 600].) The authorities cited by defendants are in harmony with this latter proposition but they do not support defendants' contention that a balancing of the hardships is required in the instant situation. Here, defendants are simply prohibited from further violations of a city zoning ordinance which by their pleadings they have admitted committing. The only "hardships" pleaded in the answer involve the loss of the

beneficial use of the variance lot to which defendants have become accustomed. The deprivation of such beneficial uses by the injunction would not, as a matter of law, raise any defenses which required a trial on the merits. Moreover, the rights of a city in the enforcement of its zoning restrictions are substantial and more than mere technical rights. The rule in this regard is stated in Fairrington v. Dyke Water Co., 50 Cal. 2d 198, 200 [323 P. 2d 1001]: "The doctorine of balancing of conveniences is often invoked as a defense in a suit for an injunction where the plaintiff, seeking to vindicate a *technical and unsubstantial right* would impose an unusual hardship upon the public, or the defendant. *Deprivation of a substantial benefit, however, falls short of the imposition of substantial hardship* . . . When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person." (Emphasis added.) It is apparent that as a matter of law, no defense of hardship was shown and that the trial court was not required to proceed to trial on this issue.

Finally, defendants make the belated argument that the answer to the complaint for injunction pleaded facts in abatement, viz., that in its answer to the cross-complaint of the defendants in the prior action, the city had prayed for "such other, further and different relief, including declaratory relief, *injunction*

and respondent's costs, as to the court may seem proper." (Emphasis added.) No motion to abate the action was made below nor does it appear that any argument was made to the trial court on this issue. Moreover, the barest perusal of the pleadings in the former action discloses that no injunctive relief as to the uses of the variance lot was sought by the city nor could the city have been awarded such relief by the trial court. The issues framed by that action, as far as the defendants' cross-complaint and answer thereto is concerned, involved only the questions of the issuance of a writ of mandate to compel the granting of a variance and a writ of mandate to compel reinstatement of the rectory permit. The answer of the city alleges no facts upon the proof of which an injunction could properly have been issued. "In order that a second action be abated because of the pendency of a prior action, it is elementary that the issues in the two actions must be substantially the same." (Trickey v. City of Long Beach, 101 Cal. App. 2d 871, 881 [226 P. 2d 694].) Thus, no prior action was pending between the parties on the issue of the injunction and the trial court did not commit error in this respect when it granted judgment on the pleadings.

The judgement in each action is affirmed.

Ashburn, *J.*, and Kincaid, *J.*, *pro tem.*,* concurred.

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*Assigned by Chairman of Judicial Counsel.

APPENDIX II.

Modification of Opinion on Denial of Rehearing by the District Court of Appeal, Second Appellate District, State of California.

In the District Court of Appeal of the State of California, Second Appellate District, Division Two.

City of San Marino, a municipal corporation, and Sophus J. Press, as Building Inspector of the City of San Marino, Plaintiffs and Cross-Defendants; Appellants and Cross-Respondents, vs. The Roman Catholic Archbishop of Los Angeles, California, a corporation sole; Reverend Wm. Fox, Pastor of Saints Felicitas & Perpetua Church, for and on behalf of the Roman Catholic Archbishop of Los Angeles, a corporation sole, and Archdiocese of Los Angeles Education & Welfare Corporation, a corporation, Defendants and Cross-Complainants; Respondents and Cross-Appellants. Civ. No. 24244.

Filed: June 1, 1960.

The People of the State of California on the relation of the City of San Marino; and the City of San Marino, Plaintiffs and Respondents, vs. The Roman Catholic Archbishop of Los Angeles, California, a corporation sole; etc., *et al.*, Defendants and Appellants. Civ. No. 23660.

THE COURT:

In its petition for rehearing, the City attempts for the first time to raise a point not previously argued, viz., that the rectory and wall permits expired 12

months after issuance, because of a provision of the City Building Code. This point, not having been rasied or argued in the City's opening or closing briefs or on oral argument, may not be considered on a petition for rehearing. "Counsel are not permitted to argue their cases in a piece-meal fashion and points not previously argued will not be considered where raised for the first time on petition for rehearing (citations)." (*Smith v. Crocker First Nat. Bank*, 152 Cal. App. 2d 832, 837. See also *Blackman v. MacCoy*, 169 Cal. App. 2d 873, 881.) But in any event, the fact that defendants failed to exercise their rights under the rectory permit was due solely to the arbitrary and wrongful action of the City in attempting to revoke the permit. The City may not now take advantage of its own wrong by arguing that defendants did not exercise their rights and therefore lost them. (*Phillips Petroleum Co. v. City of Park Ridge*, 16 Ill. App. 2d 553, 149 N. E. 2d 344.)

Good cause appearing, the opinion is modified in the following respect: The sentence "Meanwhile, during the pendency of the application for the variance, defendants applied for a building permit for their proposed rectory." (180 A. C. A. 684, at 691)* is stricken. In lieu thereof, the following sentence is substituted: Prior to the application for the variance, defendants had applied for a building permit for their proposed rectory.

Petitions for rehearing denied.

*This sentence appears on page 5 of this Appendix.

APPENDIX III.

Order of the California Supreme Court Denying Petitions for Hearing.

In the Supreme Court of the State of California, in Bank.

City of San Marino, *et al.*, Plaintiffs and Appellants, v. The Roman Catholic Archbishop of Los Angeles, *et al.*, Defendants and Appellants, 2nd Civ. No. 24244.

The People of the State of California, *ex rel.* City of San Marino, Respondents, v. The Roman Catholic Archbishop of Los Angeles, *et al.*, Defendants and Appellants, 2nd Civil No. 23660.

Petitions for Hearing Denied.

White, *J.*, is of the opinion that the Petition should be granted.

GIBSON,
Chief Justice.

Filed June 29, 1960.

APPENDIX IV.

Excerpt [pp. 47-57] From Reporter's Transcript of Proceedings Before City Council of San Marino, California, July 11, 1956.

Mr. Castruccio [Petitioners' counsel]: Now, I believe Mr. Millikan will stipulate with me—do you want to look at this, Mr. Millikan, while I ask for this stipulation—Parcel 24 on the map attached to the Application is now owned by the Applicant.

Mr. Millikan [Respondents' counsel]: So stipulated.

Mr. Castruccio: And is occupied by a residence.

Mr. Millikan: So stipulated.

Mr. Castruccio: And that the residence is used by the teachers in the parochial school.

Mr. Millikan: I understand that it is, yes.

Mr. Castruccio: Well, will you stipulate that if Father Fox would be called, he would so testify?

Mr. Millikan: I would.

Mr. Castruccio: All right. Now, will you also stipulate that Parcel 28 on the northwest corner of San Gabriel and Huntington Drive is used for a gasoline station, service station?

Mr. Millikan: So stipulated.

Mr. Castruccio: And Parcel No. 27 is now being used as a medical center?

Mr. Millikan: So stipulated.

Mr. Castruccio: And both parcels have off-street parking for their patrons?

Mr. Millikan: The medical building does and the service station is like they all are.

Mr. Castruccio: And will you stipulate that the parcels on this map, which is a part of the Application, numbered 17, 18, 19, 20, 21, 22 and 23—I notice, Mr. Chairman, that the application omits Parcel No. 23, and we would like to have leave to amend to include Parcel 23, as well as 17, 18, 19, 20, 21 and 22—they are now and have been used under C-1 zoning.

Mr. Millikan: There is some sort of a variance, as I understand it, on 17 and 18.

Mr. Castruccio: Well, Mr. Press or Mr. Martin can—

City Attorney Martin: Your list, then, Mr. Castruccio is lot 16, 17—

Mr. Castruccio: —17, 18, 19, 20, 21 and 22, on page 3 of the Application.

City Attorney Martin: And you are now adding Lot 23?

Mr. Castruccio: It should include Lot 23 on the map attached to the Application. May we amend the Application to include Lot 23, or Parcel No. 23?

Mayor Ide: You may amend it.

Mr. Castruccio: And will Mr. Millikan stipulate that 16, 17, 18, 19, 20, 21, 22 and 23, Parcels on this map attached to the Application for Variance are now being used by the St. Edmund's Episcopal Church under C-1 zoning?

Mr. Millikan: I don't know that. I know they are using it as a church. I don't know—I have a recollection that there was some variance granted on a part of it.

Mayor Ide: Are they all C-1, do you know?

Mr. Press: *Lots No. 16, 17, 18 and 19 are on a variance. They are residential-zoned lots, not business-zoned.*

Mr. Castruccio: What was that, please?

(The reporter read the record as follows):

"Mr. Press: Lots No. 16, 17, 18, and 19 are on a variance. They are residential-zoned lots, not business-zoned."

Mr. Castruccio: But they are being used for other than R-1 purposes, Mr. Press?

Mr. Press: That is correct.

Mr. Castruccio: And they are being used by the St. Edmund's Episcopal Church?

Mr. Press: Yes, sir.

Mr. Castruccio: And that use was obtained by an Application for Variance?

Mr. Press: Yes.

Mr. Castruccio: Is that so?

Mr. Press: Yes.

Mayor Ide: Were you here at that time? Do you know that?

Mr. Press: Yes. I was here at the time the church and Sunday school building were brought up.

Mr. Castruccio: That is the next question I wanted to ask. There are buildings on those parcels that you have mentioned that are being used under a variance for C-1 purposes at this time?

Mr. Press: Yes. In my time, in the time I have been employed by the City of San Marino, a church building has been built which is partly on the property in question, or the R-1 lot, and also in addition, a Sunday

school building which penetrates into the residential area, and that is in the time I have been here.

Mr. Castruccio: And those variances were granted in the time that you were here by the City Planning Commission?

Mr. Press: That is correct. The Planning Commission and/or Council. I don't know which. The City Council.

Mr. Castruccio: That was before the Planning Commission was inaugurated and instituted.

Mr. Press: That is correct.

Mr. Castruccio: So that the City Council, when it granted the Application, was acting as a Planning Commission and not as a City Council, is that right, Mr. Martin? Can we stipulate to that?

City Attorney Martin: At that time, the City Council had charge of all variances. It was within their jurisdiction. If one were granted, it was before the City Council.

Mr. Castruccio: But they were sitting as a Planning Commission?

City Attorney Martin: We had a Planning Committee, which was a committee of the City Council.

Mr. Castruccio: That is acceptable. Now, will you stipulate, Mr. Millikan, that variances have been granted by the Planning Commission of San Marino for the two Shopping Bag stores on Huntington Drive?

Mr. Millikan: I don't know anything about that at all.

Mr. Castruccio: Well, then, I will ask Mr. Press, Mr. Chairman.

Mr. Press,—

Mr. Millikan: I would object to that evidence as not being material to this variance. I don't think it has anything to do with it.

Mr. Castruccio: It is within the purview, I submit, in view of the ruling on Item No. 4 by the City Planning Commission of San Marino, June 6th, 1956, that "The history of this City for the protection of residential property from encroachment by other uses is well established and the facts and circumstances of this case do not justify a zone variance."

We are laying the foundation. We are entitled, I submit, to ask this question.

Mayor Ide: Proceed with the question.

Mr. Castruccio: Mr. Press, is it not a fact that the Shopping Bag, in both instances on Huntington Drive, in the City of San Marino, applied for and received a zone variance for off-street parking?

Mr. Press: To the best of my recollection, it was applied for and received by the Shopping Bag adjacent to the Catholic Church, or opposite the Catholic Church.

Mr. Castruccio: What about the one adjacent here?

Mayor Ide: That was the one on Huntington across the street—

Mr. Press: That is correct.

I don't recollect any for the one here during my time.

Mr. Castruccio: May I ask you, also, Mr. Press, if the property on the corner of Chelsea and Huntington Drive south received a variance for off-street parking where the Van de Kamp and San Marino Market is located?

Mr. Press: That was before my time; I wasn't here at the time.

Mr. Castruccio: Isn't it a matter of record in your office, and you know that that is such a fact?

Mr. Press: I know it is used for that, used for off-street parking.

Mr. Castruccio: Can we stipulate, Mr. Martin,—

Mayor Ide: I see no objection to stipulating.

Mr. Castruccio: We will stipulate to that.

Mayor Ide: You are talking about on Chelsea?

Mr. Castruccio: Chelsea and Huntington Drive south.

Mayor Ide: Back of the stores there on the corner?

Mr. Castruccio: Yes.

Mayor Ide: That is right.

Mr. Castruccio: It is so stipulated that a variance was granted upon an application by the property owner for off-street parking.

Mayor Ide: To my best recollection.

City Attorney Martin, in connection with those stipulations, Mr. Castruccio, I will admonish the Council while you are entitled to bring in any evidence, each variance has to be judged upon the application involved.

Mr. Castruccio: I am doing this, and I am going to offer evidence to show that we are entitled to the same consideration.

Now, isn't it true, Mr. Millikan, that you know that the Community Church in San Marino asked for and obtained a variance for off-street parking?

Mr. Millikan: I have heard something about that; I am not a member of that church.

Mr. Castruccio: Well, I will have to ask Mr. Press, then, if you won't stipulate.

Mr. Press: Yes. In my time, there was an application received and handled, I believe, by the City Council, and granted.

Mr. Castruccio: And with reference to that application for a zone variance, Mr. Press, wasn't there opposition?

Mr. Press: Gosh, I don't remember. I believe there was some, but I don't remember anything in particular.

Mr. Castruccio: All right. Who was chairman of the Planning Commission at that time?

Mr. Press: That was handled by the City Council, I believe, before the Planning Commission was in existence.

Mr. Castruccio: We will put in evidence, then, as to how much of an opposition there was. We have witnesses that attended the hearing.

Now, isn't it true, gentlemen, that San Marino Motors on Huntington Drive south here, applied for and received a variance for off-street parking?

Mayor Ide: That is not true.

Mr. Castruccio: Well, we have been told so, Mr Chairman.

Mayor Ide: I know you may have, but you didn't correct your records. San Marino Motors has nothing to do with that property. They rent from the San Marino Properties, who owns the property, and had nothing to do with the variance, neither did they apply nor have anything to do with it.

Mr. Castruccio: Then the owner of the property applied for the variance. I stand corrected.

Mayor Ide: The owner of the property, as I understand it, is the San Marino Properties, Incorporated.

Mr. Castruccio: Yes.

Mayor Ide: They applied, yes.

Mr. Castruccio: That is what I mean. I stand corrected.

Mayor Ide: I wish you would correct that, because you have used it before and you are incorrect in your statements.

Mr. Castruccio: I stand corrected, Mr. Chairman.

Mayor Ide: Thank you, sir. Go ahead.

Mr. Castruccio: I was relying on information, and that information was slightly erroneous, and now I stand corrected.

Mayor Ide: All right.

Mr. Castruccio: But that was done by the property owner, and, as lessee, San Marino Motors is lessee of that property.

Mayor Ide: Lessee of only a small portion of that property.

Mr. Castruccio: Right. There are other tenants that enjoy the off-street parking facilities to the rear of that property.

Mayor Ide: That is right. We don't enjoy any of it. If you read the variance, you would find that—and you evidently haven't—that we are the only ones that have been denied the use of it, the San Marino Motors.

Mr. Castruccio: Well, I am not trying to make any personal issue here, Mr. Chairman, and I have told you that I stand corrected.

Mayor Ide: All right. But I also want to tell you that we do not have the privilege of that.

Mr. Castruccio: Very well.

Will you stipulate, Mr. Millikan, that Huntington Drive south, and west of San Gabriel for approxi-

mately 800 feet, is zoned for C-1, and is being used for C-1 zone purposes?

Mr. Millikan: The south part of Huntington Drive on the east side of San Gabriel?

Mr. Castruccio: West of San Gabriel, I meant.

Mr. Millikan: Something like 800 feet.

Mr. Castruccio: All right, that will be stipulated. Isn't that the testimony you gave, Mr. Press, at the hearing before the Planning Commission?

Mr. Press: I don't get the question.

Mr. Castruccio: On Huntington Drive south, west of San Gabriel Boulevard, for approximately 800 feet, is zoned for C-1.

Mr. Press: I don't think so.

Mr. Castruccio: Well, will you give us the exact footage?

Mr. Press: It is definitely not 800 feet. I can't say how much it is. It is more like 350 or 400 feet, but it is definitely not 800.

Mr. Castruccio: All right. Okay.

Mr. Press: It is a very small scale map, and I can't read it.

Mr. Castruccio: All right. Will you stipulate, Mr. Millikan, on the east side of San Gabriel Boulevard and north of Huntington Drive, there is C-1 use and permits?

Mr. Millikan: There are some; I don't know how far they go or how deep they are. This City doesn't have jurisdiction over that property.

Mr. Castruccio: That is right. It is in the County.

Mrs. Tackabury: This is our next witness.

APPENDIX V.

Decision of the Superior Court of the State of California in and for the County of Los Angeles on Cross-Complaint in so Far as Same Is a Petition for Writ of Mandate, May 22, 1957, in Pasa. C-5682 (2d Civ. 24244).

In the Superior Court of the State of California in and for the County of Los Angeles.

City of San Marino, a Municipal Corporation, Plaintiff, Cross-defendant, and Respondent, vs. The Roman Catholic Archbishop of Los Angeles, California, a Corporation Sole, and Reverend Wm. Fox, Pastor of Saints Felicitas & Perpetua Church, For and on Behalf of the Roman Catholic Archbishop of Los Angeles, a Corporation Sole, Defendants, Cross-complainants, and Petitioners.

No. Pasa. C-5682.

Filed May 22, 1957.

The very limited matter before the Court at this time must be borne in mind throughout this discussion. By stipulation of counsel the Court is now deciding only the Petition for Writ of Mandate to compel the respondent City of San Marino to grant a variance as set forth in Application for Variance (Exhibit 1) known on the City records as Variance Application No. 80.

Where after full hearing in conformity with its zoning ordinance the City has denied a variance mandamus to compel the granting of such variance does not appear

to be the proper remedy for the determination of Petitioner's rights.

Hadden Inc. v. City of Inglewood, 101 C. A. (2d) 47.

Rubin v. Board of Directors, 16 C. (2d) 119.

Even if it be conceded that under certain circumstances mandamus will lie to compel the granting of a variance, in these proceedings the petitioners are faced at the outset with two well established propositions:—

(1) The application for variance concedes the constitutionality of the zoning ordinance as applied to the particular parcel of property involved.

Rubin v. Board of Directors, supra.

(2) The Court may not exercise its judgment de novo but is bound by the decision of the City Council if there is any evidence to support it, on any reasonable ground.

Lockard v. City of Los Angeles, 33 C. (2d) 453.

Wilkins v. City of San Bernardino, 29 C. (2d) 332.

Schumm v. Board of Supervisors, 140 C. A. (2d) 874.

It has been held in California, unlike the holding in many other states, that the establishment of an exclusively residential area is a proper exercise of zoning discretion, even to the extent of allowing for the complete elimination of churches from such an exclusively residential area.

Corporation of the Presiding Bishop v. City of Porterville, 90 C. A. (2d) 650. (Hearing by Supreme Court denied.)

City of Chico v. First Avenue Baptist, 108 C. A. (2d) 297, at 301.

With this premise established by the appellate courts this Court cannot say that there was no evidence upon which reasonable minds could base a finding that the maintenance of the present boundary between R-1 and C-1 property promotes the public safety and general welfare. In such a situation the Council's finding that public health and safety requires the maintenance of the present boundary between R-1 and C-1 zones cannot be disturbed. Whether the Court would have so found, had the question been one for its determination at the outset, is not material. Examination of the premises reveals that the changed boundary would bring the C-1 use up directly opposite the dead end of a wholly residential street and a portion thereof opposite a well improved residential property which now faces only R-1 zoning. Evidence of increased noise, increased traffic on curved residential streets and decreased residential property values in a basically residential community support the Council's determination, even if there was substantial, or to other reasonable minds, preponderating, evidence to the contrary on each of these points.

There is no showing in this case, as there was in The Roman Catholic Welfare Corporation v. City of Piedmont, 45 C. (2d) 325, that public schools were permitted in R-1 Zone from which a portion of Petitioner's activities were barred, nor that the zoning was such that refusal to allow the expansion of this or any parochial school into R-1 territory would effectively bar such schools from the City. Nor is this a case like State v. Joseph, 130 Ohio State 229; 39 N. E. (2d) 515, where the council as a legislative body passed an ordinance which allowed churches in the R-1 area, but as an executive body acting with the zoning commis-

sion adopted an arbitrary rule barring them from such R-1 area so long as available land remained in other areas.

For still another reason the Council's action must be upheld. The validity of the ordinance being limited by the variance application Petitioner must bring itself within the requirements of such ordinance. One of these requirements is a showing that, unless the variance is granted, the property would be deprived of privileges enjoyed by other properties in the same district or vicinity. Petitioner has the burden of such showing. The basic privilege of other properties in the adjacent R-1 district or vicinity is to be used for residential purposes. The Petitioner made no showing whatsoever that the variance lot was not usable for said purposes. On the contrary it appeared that Petitioner is about to make a residential use of a portion of its land for a rectory. There is no doubt but Petitioner has the right to locate its rectory on the C-1 portion of its property if it so desires. However, the availability of a residential use for the variance lot is material both on the question of whether the residence privileges of other lots is likewise available to this lot and in determining whether it is the City's zoning or the Petitioner's own actions which give rise to the alleged hardship. By failing to show any reason why the residential use about to be made or its total properties could not appropriately be placed on the R-1 lot Petitioner has failed to sustain its burden of proving that its lot is deprived of exactly the same type of residential use as is available to other adjacent R-1 lots similarly situated. The only originally R-1 lots in the vicinity which were

shown to have any other privilege were parcels 17, 18 and 19 used by St. Edmund's Episcopal Church (parcels 20, 21, 22 and 23 appear to have been zoned C-1 at all times as was petitioner's Parcel 26). Conditions as to parcels 17, 18 and 19 are not the same as those involved with parcel 25. The former parcels are on a straight, busily travelled thoroughfare and across the street from property of a less restricted zoning than R-1; the latter is on a shorter, curved street and across from property both zoned and improved exclusively for residential purposes.

Since it appears first, that mandamus to compel the granting of a variance is not the proper remedy; second, that there is evidence to support the Council's denial of the variance as detrimental to the public safety and general welfare; and third, that Petitioner has not sustained the burden of proving that the denial deprives the property of privileges enjoyed by other properties in the same district or vicinity, the application for writ of mandate is denied. However, this ruling does not dispose of all the issues between the parties and as there can be but one final judgment between the same parties in the same action (De Valley v. Kendall De Valley, etc., 220 Cal. 742; Nicholson v. Henderson, 25 C. (2d) 375) counsel will consult with the Court as to the proper form for this Order.

Dated: This 22nd day of May, 1957.

/s/ James G. Whyte,

Judge of the Superior Court.

APPENDIX VI.

Judgment of the Superior Court of the State of California in and for the County of Los Angeles, June 17, 1959, in Pasa. C-5682 (2d Civ. 24244).

In the Superior Court of the State of California in and for the County of Los Angeles.

City of San Marino and Sophus J. Press as Building Inspector of said City, Plaintiffs and Cross-Defendants and Respondents vs. The Roman Catholic Archbishop of Los Angeles, California, a Corporation Sole, and Reverend Wm. Fox, Pastor of Saints Felicitas & Perpetua Church, for and on behalf of the Roman Catholic Archbishop of Los Angeles, a Corporation Sole, and The Archdiocese of Los Angeles Education & Welfare Corporation, a Corporation, Defendants and Cross-Complainants and Petitioners.

Filed June 17, 1959.

No. Pasadena C5682.

The above entitled matter having been regularly tried in two separate hearings by Stipulation of the parties, the first of said hearings having occurred on May 13, 1957 before the Honorable James G. White on a limited issue and the second of said hearings having been held on November 24, 1958 before the Honorable Kenneth C. Newell, both of said hearings having been held in Pasadena Department C of the above entitled Court and both of said Judges having sat without jury, a jury having been specifically waived, plaintiffs and cross-

defendants, herein sometimes called "respondents" and plaintiff and cross-defendant City of San Marino, being sometimes herein called "City", appeared by Charles R. Martin, Esq., City Attorney and Robert H. Dunlap, Esq., one of Special Counsel, their attorneys, and the defendants and cross-complainants, herein sometimes called "petitioners" having appeared by C. M. Castruccio, Esq., their attorney; and Ernest F. Bent, *et al.*, *amici curiae*, having appeared by Millikan and Montgomery by Charles E. Millikan, Esq., their attorneys and the Court, by the Honorable Kenneth C. Newell, has made Findings of Fact and Conclusions of Law constituting the decision of said Court as a result of both of said hearings which Findings of Fact and Conclusions of Law incorporated the applicable provisions of Interlocutory Findings made and signed by the above Honorable James G. Whyte. The above entitled Court tried said cause on the issues framed by respondents' original complaint for declaratory relief and supplemental complaint and petitioners' second amended answer to said complaint and petitioners' cross-complaint for declaratory relief and writ of mandate and respondents' answer and supplemental answer thereto. No formal pleadings were filed by *amici curiae* although they were represented at certain of said hearings.

Said Findings of Fact and Conclusions of Law signed by the Honorable Kenneth C. Newell on April 1, 1950 ordered judgment for plaintiffs and respondents on the issue of whether or not the Planning Commission of respondent City of San Marino and the City Council of City acted arbitrarily and beyond the limits of discretion conferred upon them by law in denying petitioners' application for zone variance, and said Findings

ordered judgment for petitioners on the issue as to whether or not a revocation of building construction permit No. 10496 had been unlawfully and arbitrarily revoked and ordered and directed the issuance of a writ of mandate commanding City and its Building Inspector Sophus J. Press, to reinstate said building permit No. 10496.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, as follows:

1. An actual controvery existed at the time of the filing of respondents' complaint for declaratory relief and petitioners' cross-complaint for writ of mandate.

2. That the revocation of permit No. 10496 authorizing the construction of the rectory therein referred to was, and is invalid.

3. That Ordinance No. 601 of City does not act retroactively and by reason thereof does not affect any rights that have accrued to petitioners under permit No. 14096.

4. That said permit No. 10496 should be reinstated and petitioners permitted to proceed thereunder and the rectory and dedicated C-1 parking area referred to are not to be used until such time as the wall referred to in said permit is completed and accepted by the respondents.

5. That petitioners did not sustain the required conditions precedent to the granting of the writ of mandate commanding the issuance of the granting of the variance applied for in that there was substantial evidence presented to said City Council in the light of the whole record to support the determination of its City Council of the City of San Marino that petitioners did

not show that there were special circumstances pertaining to the variance lot which do not apply generally to other properties or classes of uses in the same district. Petitioner did not sustain by proof the condition precedent that the granting of the variance will not result in material damage or prejudice to other property, and will not be detrimental to the public welfare and will not be injurious to the persons in the vicinity thereof, but on the contrary, in light of the whole record, the grant of the variance would and will result in damage and prejudice to the nearby property and will be injurious to the persons in the vicinity thereof. Petitioner did not sustain the burden of proving that the variance lot is unique and would without grant of the variance be deprived of privileges enjoyed by other property in the same district.

6. That a full and fair hearing after due and legal notice was accorded to petitioners by the Planning Commission of City and after denial of petitioners' application for the variance on appeal to the City Council a full and fair hearing was accorded to petitioners by said City Council.

7. That the filing of the variance application admitted the validity and constitutionality of the Zoning Ordinance of the City of San Marino.

8. That petitioners are not entitled to the issuance of either an alternative or a peremptory writ of mandate directing the granting of a variance as to the variance

lot pursuant to petitioners' application No. 80 or otherwise.

9. That petitioners are entitled to the issuance of a peremptory writ of mandate directing and requiring respondent Sophus J. Press and respondent City to reinstate permit No. 10496 dated August 10, 1956 which permit was issued to C. & H. Contractors for the construction of a parish rectory, provided that said rectory and the dedicated C-1 parking area are not to be used until such time as the wall referred to in permit No. 10495 is completed and accepted by respondents.

10. All parties hereto shall bear their own costs.

The Clerk of the above entitled Court is hereby Ordered to enter this judgment.

Dated: June 17, 1959.

/s/ Kenneth C. Newell,
Judge of the Superior Court.

APPENDIX VII.

Judgment of the Superior Court of the State of California in and for the County of Los Angeles, September 1, 1958, in Pasa. C-5972 (2d Civ. 23660).

In the Superior Court of the State of California in and for the County of Los Angeles.

The People of the State of California on the relation of the City of San Marino; and the City of San Marino, Plaintiffs, vs. The Roman Catholic Archbishop of Los Angeles, California, a Corporation Sole; Reverend Wm. Fox, Pastor of Saints Felicitas & Perpetua Church, for and on behalf of the Roman Catholic Archbishop of Los Angeles, a Corporation Sole, and Archdiocese of Los Angeles Education & Welfare Corporation, a Corporation, Defendants.

No. Pasadena C-5972.

Filed April 1, 1958.

The above entitled matter having come on regularly for hearing before the Honorable Kenneth C. Newell, Judge, of the above entitled Court, presiding in Pasadena, Department "C", thereof on August 6, 1957, upon the plaintiffs' Motion for judgment on the pleadings, plaintiffs appearing by Charles R. Martin, Esquire, City Attorney, and Dunlap, Holmes, Ross & Woodson, Special Counsel by Robert H. Dunlap, Esquire, their attorneys and the defendants, The Roman Catholic Archbishop, of Los Angeles, a Corporation Sole, and the Reverend Wm. Fox, Pastor of Saints Felicitas &

Perpetus Church appearing by C. M. Castruccio, Esquire their attorney and prior to said hearing, the said plaintiffs and said defendants having stipulated that The Archdiocese of Los Angeles Education & Welfare Corporation, a Corporation Sole, represented by C. M. Castruccio, Esquire, should be deemed a party defendant on the above described action as the owner of record since March 2, 1956, of the real property described in paragraph VIII of plaintiffs' complaint and therein and herein designated as Parcel 25, and that said additional defendant might be added as a party defendant to the original complaint on file herein and should be deemed to have appeared with the two other above named defendants and to have adopted their pleadings as and for its pleadings, and said Court having continued said matter for decision to Tuesday, August 19, 1958, at the hour of 9:30 A.M. for decision, and having considered the pleadings, plaintiffs' Motion and the authorities submitted by the respective parties and having requested and received additional argument on August 19, 1958, and being fully advised in the premises did on said last mentioned date grant said motion for judgment on the pleadings and did order that an injunction issue as prayed in the plaintiffs' complaint against the defendants, including said additional defendant, The Archdiocese of Los Angeles Education & Welfare Corporation,

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed, as follows:

1. That Section 23.9 of the Code of the City of San Marino permits in the One-Family Dwelling Zone of said City, accessory uses customarily incidental to a single family dwelling and private recreational facili-

ties. Section 23.21 of said Code declares that it is unlawful to use or cause or permit any premises in said One-Family Dwelling Zone to be used for any purpose or in any manner contrary to said use provisions. Section 23.53 of said Code declares that any use contrary to the provisions of said Code to be unlawful and a public nuisance, and authorizes the prosecution of proceedings to enjoin any such prohibited use or uses. The answer of defendants admits the use of said Parcel 25 for purposes prohibited by said Code and said admitted uses constitute and are public nuisances. No valid defense or showing is pleaded by defendants and it is proper that an injunction issue as prayed by plaintiffs.

2. That the defendants, The Roman Catholic Archbishop of Los Angeles, California, a Corporation Sole, Reverend Wm. Fox, Pastor of Saints Felicitas & Perpetus Church for and on behalf of said last named Corporation Sole and Archdiocese of Los Angeles Education & Welfare Corporation, and each of them and their agents, servants, and employees and all persons acting in concert with them or any of them, be and hereby are perpetually enjoined from authorizing, permitting, maintaining or causing to be maintained on said Parcel 25 hereinafter more particularly described or any part of said parcel 25 any use thereof for,

(a) the parking or storage of automobiles,

(b) the parking or storage of bicycles.

(c) organized or supervised recreational or school activities of the students and pupils attending the school commonly known as Saints Felicitas & Perpetua parochial school.

The said parcel 25 is an unpaved parcel of residential zoned property bounded on the south by the north line of the paved area occupied at the date of this judgment by the said Saints Felicitas & Perpetua Church and Parochial school and Rectory (commonly known as "The Old Adobe") which church school property fronts south on Huntington Drive and west on Palomar Road, and extends approximately 270 feet northerly from the north line of said Huntington Drive. Said parcel 25 is approximately 85 feet in width and fronts upon Palomar Road opposite the west end of Cumberland Road in San Marino and is bounded on the north by a stone wall varying in height from two to three feet delineating the south boundary of a residence now occupied by Sisters teaching in said parochial school. The exact description of said parcel 25 as to which said uses are hereby enjoined is:

"That part of Lot 'B' of Tract No. 8839, in the City of San Marino, as per map recorded in Book 146, Page 3, et seq., of Maps, in the office of the County Recorder of said County, described as follows: Beginning at a point in the southerly line of said lot, distant thereon South 70 degrees 19' and 15" West 200 feet from the intersection of the Easterly prolongation of the tangent portion of said Southerly line with the

Southerly prolongation of the tangent portion of the Easterly line of said Lot; thence north 19° 40′ 45″ West 270.00 feet to the true point of beginning; thence continuing North 19° 40′ 45″ West 85 feet; thence parallel with the tangent portion of said Southerly line South 70° 19′ 15″ West to a point in the Westerly line of said Lot; thence Southerly and Southwesterly along the Westerly line of said Lot to a line parallel with the tangent portion of said Southerly line which passes through the true point of beginning; thence along said parallel line North 70° 19′ 15″ East to the true point of beginning."

The Clerk of the above entitled Court is hereby Ordered to enter this judgment.

Dated: Sept. 4, 1958.

/s/.....

Judge of the Superior Court in and for the County of Los Angeles, State of California.

8/27/58 Approved as to Form.

C. M. Castruccio,

Attorney for Defendants.

LE COPY

FILED
OCT 19 1960

IN THE

Supreme Court of the United States

October Term, 1960

No. 440

THE PEOPLE OF THE STATE OF CALIFORNIA, on the relation of the City of San Mateo, [illegible]

Plaintiff,

vs.

THE ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO, a corporation sole, CALIFORNIA [illegible] of Saints Peter and Paul, a corporation, ROMAN CATHOLIC [illegible] a corporation sole, and TION & [illegible]

Defendants,

CITY OF SAN [illegible] Municipal Corporation,

Cross-Complainant, Respondent and Appellant,

vs.

SOPHUS J. [illegible] Supervisor of the City of San Mateo,

Cross-Defendant, Appellant and Respondent,

vs.

THE ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO, a corporation sole, CALIFORNIA [illegible] of Saints Peter and Paul, a corporation, ROMAN CATHOLIC [illegible] a corporation sole, and TION & [illegible]

Defendants,

Answer to Petition for Writ of Certiorari to the District Court of Appeal, First Appellate District, State of California.

ROBERT H. DUMLAP,
[illegible] Wells Fargo Bank Building,
Pasadena, California,

JOHN W. HOLMES,
[illegible] First Western Bank Building,
Pasadena, California,

Attorneys for Respondents.

Of Counsel,
CHARLES R. MARTIN,
2304 Huntington Drive,
San Marino, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 440

THE PEOPLE OF THE STATE OF CALIFORNIA on the relation of the City of San Marino; and the CITY OF SAN MARINO,

Respondents

vs.

THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, CALIFORNIA, a Corporation Sole; REVEREND WM. FOX, Pastor of Saints Felicitas & Perpetua Church, for and on behalf of THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, a Corporation Sole, and ARCHDIOCESE OF LOS ANGELES EDUCATION & WELFARE CORPORATION, a Corporation,

Petitioners.

CITY OF SAN MARINO, a Municipal Corporation,

Plaintiff and Cross-Defendant in Certain Pleadings,

and

SOPHUS J. PRESS, a Building Inspector of the City of San Marino,

Cross-Defendant;
Respondents,

vs.

THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, CALIFORNIA, a Corporation Sole; REVEREND WM. FOX, Pastor of Saints Felicitas & Perpetua Church, for and on behalf of THE ROMAN CATHOLIC ARCHBISHOP OF LOS ANGELES, a Corporation Sole, and ARCHDIOCESE OF LOS ANGELES EDUCATION & WELFARE CORPORATION, a Corporation Sole,

Defendants, Cross-Complainants and Petitioners in Certain Pleadings,

Petitioners.

Answer to Petition for Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California.

Respondents pray that the petition for writ certiorari prayed for be denied.

Jurisdiction.

Petitioner states that the two cases were and are here consolidated. The two cases were tried separately and separate judgments were entered. They were consolidated for hearing on appeal. No federal question was pleaded or decided in the State Courts.

Questions Presented.

(1) The record here presented does not disclose that the same, or even comparable, zoning variances were granted to others and there was no claim in the trial court that any constitutional provision was violated.

(2) The record discloses continued violations of an admittedly valid zoning ordinance and there is neither pleading nor proof of any duty on the part of the city to enforce said ordinance.

Constitutional Provisions Involved.

Neither the original pleadings nor the decisions of either the trial or appellate courts make reference to any Federal constitutional provisions even by innuendo; therefore, no Federal constitutional provisions are involved.

Counterstatement of the Case.

The statement of the case appearing in petition, pages 4 to 9 thereof, is erroneous in the following important respects:

(a) There were no stipulations that other churches were similarly situated or comparable [see Rep. Tr. Proceedings, pp. 44-57, App. IV to the petition]. There is no intimation that any other church in San Marino operated a full time grammar school operating on week days.

(b) Judge Whyte who viewed the premises declared in his memorandum decision (see App. V to the petition, p. 43) that St. Edmund's Church was on a busily travelled through thoroughfare across from a less restricted zoned area while petitioner's property is on a shorter curved street and across from property both zoned and improved exclusively for residential uses.

Reasons for Denial of the Petition.

I.

No Federal question was decided by the court below nor was any Federal question raised by the pleadings.[1]

There was no pleading making reference to any unconstitutional provision as to the variance matter. The only use of the word "unconstitutional" appears in connection with the revocation of the permit which matter is not before this court. (See footnote 1 on p. 4 of Pet.)

If a Federal question is not properly raised in the courts below or if the State court decision is supportable on non-Federal grounds, the writ will be denied.

Ellis v. Dixon, 349 U. S. 458 at 460;

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[1] It is true that petitioner in its appeal to the City Council from the action of the Planning Commission states "That said ruling denying said application is unreasonably discriminatory and arbitrary, unconstitutional and void".

"That the refusal to grant said application for variance denied the fundamental rights guaranteed applicant by the 14th Amendment to the Constitution of the United States, and violated the due process clauses of the Constitution of California and the Constitution of the United States (see Reporters' Transcript Proceedings, Pages 7 and 8).

Cincinnati, New Orleans & Texas Pacific Railway v. Pless and Slade, 216 U. S. 78 at 83 and 84;

Zorach v. Clauson, 343 U. S. 306 (see Footnote 7, pp. 312-313).

(For the basis of petitioner's claim in the court below see Appendix D hereto.)

Isadore Edelman v. People of the State of California, 344 U. S. 357 at 358;

28 U. S. C. A., Sec. 1237 (3);

Hooker v. Los Angeles, 188 U. S. 314 at 320, 321.

A mere reference in a pleading to a deprivation of rights without due process will be deemed to refer to the State Constitution.

Bowe v. Scott, 233 U. S. 658 at 664-5.

It is immaterial that variances have been granted to others unless the proof of discrimination is clear.

Edelman v. State of California, 344 U. S. 357 at 359.

II.

The matter sought to be reviewed is an exercise of discretion based upon conflicting evidence and this court will not take jurisdiction where a local agency has made findings of facts which are supported by evidence.

Petitioner, in effect, would substitute his judgment as to requirements of the public interest for that of the duly constituted administrative officials.

Berman v. Parker, 348 U. S. 26 at 35.

See also:

Railroad Commission of Texas v. Rowan and Nichols Oil Company, 310 U. S. 573 at 580-81.

III.

Where, as here, provision exists for a determination after hearing by an administrative agency, the constitutional requirements are complied with.[2]

Chicago and Northwestern Railroad Co. v. Ochs, 249 U. S. 416, at 422.

Variances can only be granted "when practical difficulties or unnecessary hardships so require." [Hearing transcript pp. 4-5]. See Judge Whyte's decision App. V to the petition page 42.

IV.

Churches enjoy no special privileges as to zoning matters in California.

Minney v. City of Azusa, 164 Cal. App. 2d 12, at 25 and 26, certiorari denied 3 L. Ed 2d 932.

The Corporation of the Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656.

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[2]As to zoning matters, the San Marino Code provides for variances where applicant shows (a) special circumstances; (b) the variance would not result in prejudice to other property or detriment to public welfare or injury to the persons in the vicinity; and (c) the property is unique and would otherwise be deprived of privileges enjoyed by other properties in the same district and vicinity. [Rep. Tr. pp. 4 and 5.]

V.

The injunction against continued violations of the ordinance is proper. Continued violations of the law confer no vested rights.

Johannessen v. United States, 225 U. S. 227 at 243 "There is no such thing as a vested right to do wrong".

Freeborn v. Smith, 2 Wall. 160 at 165.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. DUNLAP,
JOHN W. HOLMES,
Attorneys for Respondents.

Of Counsel,
CHARLES R. MARTIN,

APPENDIX A.

Cross-Complaint and Petition for Writ of Mandate.

[Clerk's Transcript, pages 17-22]

Title of Court and Cause.

No. Pasa. C 5682.

Defendants complain of Plaintiff and for Cross-Complaint and as a Petition for Writ of Mandate allege:

I.

For sake of convenience and to avoid confusion, defendants and cross-complainants hereinafter are referred to as Petitioner, and Plaintiff and Cross-defendant is hereinafter referred to as Respondent.

II.

II. and III. allege the corporate capacity of the archbishop and of the city.

* * * * *

IV.

Petitioner alleges that in October 1939 it established and has ever since conducted and maintained a Roman Catholic Parish Church and Rectory on certain real property in the City of San Marino, in the County of Los Angeles, State of California. Said Parish is known as Saints Felicitas and Perpetua Parish. That said real property was acquired in October 1939 and is approximately 300 by 270 feet; having a frontage of approximately 300 feet on Huntington Drive North, 272 feet along Palomar Road, being its westerly boundary; 290 feet along its northerly boundary and 270 feet along its easterly boundary. That an "Old Adobe" building which was on said property was used as a church and rectory.

V.

That in April 1940 Respondent adopted its zoning ordinance, and all of the real property owned by Petitioner, at said time, was placed in C-1 Zone.

VI.

That in 1948 Petitioner constructed a new church on a portion of said C-1 zoned property. At present approximately 3,000 parishioners attend and are regular communicants of said parish; that at least two-thirds of said parishioners are bona fide residents of San Marino; that said church has seating accommodations for approximately 700 persons and religious services are conducted every Sunday at the following hours: Seven, Eight, Nine Ten, Eleven A.M., and Twelve o'clock noon; in addition religious services are conducted on all Holy Days of obligation, at convenient hours, and on other days and evenings throughout the year, in accord with the custom and practice of the Roman Catholic Church. After constructing said church, the said "old adobe" has been used as a residence for the Pastor and his assistant and as a cafeteria, auditorium and meeting place for parishioners and school children.

VII.

That in 1950 Petitioner constructed a parochial elementary 1-8 grade school, on a portion of said C-1 zoned property; approximately 425 children are in regular attendance and two-thirds are bona fide residents of San Marino.

VIII.

That in 1947 Petitioner acquired certain real property adjacent to and directly north of said C-1 property. At the time of said acquisition said property was unimproved

and is now unimproved and in an R-1 zone. Said property has frontage of approximately 100 feet on Palomar Road; 240 feet along its northerly boundary; 85 feet along its easterly boundary and 290 feet along the southerly boundary of same. Said property for convenience shall be called the R-1 Variance lot.

IX.

That in 1954 Petitioner acquired certain R-1 property from a Mrs. Reynolds, which was and is now improved with a residence and occupied at the present time by the Nuns who teach at said parochial school. The purchase price was $42,500.00, and at the time Mrs. Reynolds acquired same in 1947 she paid $29,500.00. For sake of convenience said property will be referred to as the Reynolds property. Said Reynolds property is adjacent to and immediately north of said R-1 Variance lot.

X.

Petitioner alleges that on January 24, 1956 Respondent submitted to Petitioner, a certain memorandum summarizing the result of a conference between Respondent and Petitioner, regarding the understanding and agreement between said parties in connection with the issuance of permits for construction of certain buildings that Petitioner intended to construct on C-1 zoned property of Petitioner in said City of San Marino.

That, as requested, Petitioner read, approved and agreed with the terms and conditions of said memorandum and executed same and delivered an executed copy to Respondent; copy of which is attached hereto, as Exhibit C1a) and by reference incorporated herein as though at this point set forth in full.

XI.

Alleges that pursuant to said understanding and agreement of January 24, 1956 Petitioner applied for a variance of said R-1 (Variance) lot.

Application was filed on March 2, 1956 with the City Planning Commission of Respondent; that same was denied on June 6, 1956.

An appeal was filed with the City Council and on August 8th, 1956 said City Council denied same.

The proceedings before said City Council were reported and a full transcript of same is on file with this Court and marked as Exhibit 2a and by reference incorporated herein as though at this point set forth in full.

* * * * *

XIII.

On August 8, 1956, when said City Council denied said appeal Petitioner thereafter gave Oral Notice of intent to Petition for Writ of Mandate, and Petitioner further requested a conference with the Mayor of Respondent in order that His Eminence James Francis Cardinal McIntyre might, as a matter of courtesy, explain and state why Petitioner was proceeding with the Petition for Writ of Mandate; said conference was held as indicated in Exhibit B attached to Respondent's complaint herein; that His Eminence James Francis Cardinal McIntyre, as shown in Exhibit C of Respondent's complaint, made no statements in substance or effect, that Petitioner would not or did not intend to construct a wall between the R-1 Variance Lot and C-1 property.

XIV.

Petitioner has performed all of the conditions set forth in said memorandum of January 24, 1950; Respondent acknowledging said fact issued said Permits No. 10495 and No. 10496; notwithstanding all of the foregoing, Respondent without just cause or provocation revoked said permits; that such revocation is unreasonable, discriminatory, arbitrary, capricious; unconstitutional and void.

That such revocation is causing irreparable damage to Petitioner and no adequate or speedy remedy is available at law.

That Respondent's failure and refusal to grant a variance as applied for by Petitioner is also causing Petitioner irreparable loss and damage and no adequate or speedy remedy is available at law.

Wherefore, your Petitioner prays that there may be issued against Respondent an Alternative Writ of Mandate returnable within ....days compelling Respondent to issue:

1. A variance as requested on said real property described as:

Lot 25 Being a portion of Lot B, Tract 8839, Map Book 146, Pages 3-7, Records of Los Angeles County, State of California.

2. Said Building Permits No. 10495 and No. 10496, as previously issued and then revoked, or show cause why it should not do so.

s/ C. M. Castruccio.

Attorney for Petitioner.

APPENDIX B.

Complaint (For Injunction).

Clerk's Transcript pp. 1-7

[Title of Court and Cause.]

No. Pasa. C 5972.

[Title of Court and Cause]

Plaintiffs Complain of Defendants and Allege:

I.

At all times mentioned herein, Plaintiff, the City of San Marino, hereinafter called "City", was and now is a Municipal Corporation, duly organized and existing as a general law city under the constitution and laws of the State of California, and located within the County of Los Angeles.

II.

That Charles R. Martin is now and at all times herein mentioned was the duly appointed, qualified and acting City Attorney of the City of San Marino, California.

III.

That the Defendant, the Roman Catholic Archbishop of Los Angeles, California, A Corporation Sole, hereinafter referred to as "church", was at all times mentioned herein and is now, A Corporation Sole duly organized and existing under and by virtue of the laws of the State of California, with its principal offices located in the County of Los Angeles, California.

IV.

That the Church is now, and since the year 1939 has been, the owner of a parcel of land in the City of San Marino comprising two acres, more or less, which is

sometimes hereinafter referred to as the "principal property". Said principal property is a corner parcel bounded on the south by Huntington Drive and on the west by Palomar Road, both public streets in the City of San Marino. That the principal property is now improved with a Roman Catholic Church, a rectory, and a parochial school attended by numerous children of school age. That a portion of the remainder of said property is surfaced with blacktop paving for use as, and is in use as, a playground during school hours and after school, and as a parking lot during church services at said Church.

V.

That Defendant, Reverend William Fox, Pastor of Saints Felicitas & Perpetua Church, hereinafter referred to as "basilica", is now and at all times herein mentioned has been acting for and on behalf of Defendant Church, as pastor of said Saints Felicitas & Perpetua Church and as the person in charge of said parochial school.

VI.

Defendants Does 1 to 100 inclusive, Roe Corporations I-X inclusive, and First, Second and Third Company copartnerships are sued herein under fictitious names by reason of the fact that Plaintiffs are not now aware of their true names and, upon ascertaining the same, plaintiffs will ask leave to amend this complaint by inserting the true names of said defendants herein together with appropriate charging allegations. That certain of said fictitious defendants are parishioners of said basilica, certain of said fictitious defendants are children attending said parochial school, certain of said fictitious defendants are nuns and teachers in said parochial school and certain of said fictitious defendants are

volunteer workers connected with said basilica in divers capacities.

VII.

That this is an action to abate a public nuisance and to enjoin violations, as hereinafter alleged, by defendants of Section 239 of the San Marino City Code.

VIII.

That at all times mentioned herein, the Church was and is now the owner of the following described parcel of real property in the City of San Marino, which said parcel of real property is hereinafter referred to as Parcel 25:

> That part of Lot "B" of Tract No. 8839, in the City of San Marino, as per map recorded in Book 146 Page 3, et seq., of Maps, in the office of the County Recorder of the said County, described as follows:
>
> Beginning at a point in the Southerly line of said Lot, distant thereon South 70° 19' 15" West 200 feet from the intersection of the Easterly prolongation of the tangent portion of said Southerly line with the Southerly prolongation of the tangent portion of the Easterly line of said Lot; thence North 19° 40' 45" West 270.00 feet to the true point of beginning; thence continuing North 19° 40' 45" West 85 feet; thence parallel with the tangent portion of said Southerly line South 70° 19' 15" West to a point in the Westerly line of said Lot; thence Southerly and Southwesterly along the Westerly line of said Lot to a line parallel with the tangent portion of said Southerly line which passes through the true point of beginning; thence along said parallel line North 70° 19' 15" East to the true point of beginning.

That said Parcel 25 lies adjacent to and is bounded on the south by the principal property aforesaid; that said Parcel 25 is now, and at all times since the year 1953 has been, unimproved and unpaved.

IX.

That under and by virtue of Chapter 23, of the San Marino City Code, duly adopted as a part of the codification of the ordinances of the City of San Marino, and pursuant to the Zone Map adopted therewith, said Parcel 25 is now and at all times mentioned herein has been zoned under the zoning laws of the City of San Marino as an R-1 lot.

X

That Section 23.9 of said Chapter 23, of the San Marino City Code imposes the following use restrictions on all R-1 property in the City of San Marino, and in particular imposes such use restrictions on said Parcel 25:

"The following uses shall be permitted in the R-1 One-Family Dwelling Zone:

(a) One-family dwellings of a permanent character, placed in a permanent location, containing not more than one kitchen and used by but one family.

(b) Accessory buildings and uses customarily incidental to each one-family dwelling when placed upon the same lot or parcel of land and not used or operated commercially, including:

1. Private garages; provided, that on lots or parcels of land in Area Districts V, VI and VII, such private garages shall not exceed sixteen feet in height and shall not have an aggregate total capacity for more than three automobiles.

2. Private recreational facilities;

3. Private bathhouse, greenhouse or service yard;

4. Private tool shed or work shop;

5. Servants' quarters; provided, that on lots or parcels of land in Area Districts V, VI and VII no kitchen or kitchen facilities shall be included in such accessory building.

(c) One unlighted sign not to exceed four hundred seventy-five square inches over all nor twenty-eight inches in length to be located not less than ten feet from any side line of the lot upon which such sign is placed and the top of which shall not exceed thirty-six inches above the ground level, pertaining only to the rental, lease or sale of the building or property upon which such sign is located; provided, however, that upon each five acres of a subdivision one sign, not exceeding ten feet by twelve feet, pertaining only to the rental, lease or sale of the building or property upon which it is located, may be placed not less than one hundred and fifty feet in any direction from a residence.

(d) Fences shall conform to the requirements of chapter 7 of this Code, relating to fences."

XI.

That on numerous and divers occasions, prior to the commencement of this occasion, defendants, and each of them, have violated said R-1 use limitations, and in particular, have violated Section 23.9 of the San Marino City Code by authorizing, permitting, maintaining in, on and upon Parcel 25 and using the same for the following uses:

(a) Use thereof for the storage or parking of automobiles and bicycles.

(b) Use thereof for organized or supervised recreational and school activities in connection with Defendants' Parochial School.

XII.

That the defendants and each of them have declared their inability and refusal to discontinue the use of said premises in the manner aforesaid and will not do so unless enjoined and restrained by injunction or other appropriate order of this court.

XIII.

The City has no adequate remedy by law or by way of damages to remedy defendants' violations of Section 23.9 on Parcel 25, other than to seek the enjoinment thereof by this court.

XIV.

That this action is brought pursuant to Section 731 and 732 of the Code of Civil Procedure and Section 23.53 of the San Marino City Code, which said Section 23.53 reads as follows:

> "Any building or structure hereafter set up, erected, built, moved or maintained and any use of property hereafter contrary to the provisions of this chapter are hereby declared to be unlawful and a public nuisance and the city attorney shall, upon order of the city council, commence action or proceeding for the abatement, removal and enjoinment thereof, in the manner provided by law, and shall take such steps and shall apply to such court as may have jurisdiction to grant such relief as will abate and remove such building, structure or use and restrain and enjoin any person from setting up, erecting, building, moving or maintaining any such building or structure, or using any property contrary to the provisions of this chapter."

XV.

That on February 13, 1957, the City Council of the City of San Marino did by Resolution No. 946, authorize and instruct the City Attorney to file this action, declaring the violations of Section 23.9 by the Defendants, as above alleged, to be a public nuisance, and ordering the abatement thereof.

XVI.

That it is necessary and a matter of public concern that City protect the sanctity of its zoning laws by the enjoinment of any violations thereof.

Wherefore, plaintiffs pray judgment as follows:

1. That the authorizing, permitting, maintaining, causing to be maintained by defendants on said Parcel 25 of, and the use by them of said Parcel or any part thereof (a) for the parking or storage of automobiles and bicycles, or (b) for the organized or supervised recreational or school activities of defendants, be declared to be a public nuisance.

2. That such public nuisance be abated.

3. That a preliminary injunction issue enjoining and restraining the defendants and each of them, they and each of their agents, servants and employees, and all persons acting in concert with them, or any of them from the practice, conduct or commission of any such public nuisance.

4. That upon the trial of said action, the parties named in the foregoing Paragraph 3 of this prayer be permanently enjoined from the practice, conduct or commisssion of any such public nuisance.

5. For such other and further relief as to the court may seem proper in the premises.

/s/ Charles R. Martin,

City Attorney

APPENDIX C.

Answer to Complaint for Injunction.

[Title of Court and Cause.]

No. Pasa. C 5972. Clerk's Transcript pp. 9-17.

Comes Now the Roman Catholic Archbishop of Los Angeles, a Corporation Sole, and Reverend William Fox, for themselves alone, and answer Plaintiffs' Complaint, admit, deny and allege:

I.

Answering Paragraph IV, allege that said "principal property" is now and ever since 1939, the date of its acquisition by Defendants, was zoned as C-1. That Defendants have, since 1939, used said property for Church purposes; that said school was built and has been in use since 1950. That over 450 children are in regular attendance at said parochial school. The majority of children in attendance reside in San Marino. The majority of parishioners (3,000) attending said Church are residents of San Marino.

II.

Defendants have no information or belief on the subject sufficient to enable them to answer the allegations of Paragraph VI, and placing their denial on that ground, deny generally and specifically every allegation therein.

III.

Deny generally and specifically each and every allegation contained in Paragraph VII.

IV.

In answer to paragraphs VIII, XI and XII, allege that said Parcel 25, was acquired in 1947, and that ever since 1947, said parcel has been used continuously by parish-

ioners of said "Church", for parking of their automobiles while attending religious services at said "Church". That said use is limited to the morning hours on Sundays and certain Holy Days of Obligation and a limited number of evening services.

Further allege that ever since 1950, when said parochial school was built on said "Principal Property", the children attending said school have continuously used said Parcel 25, for recreational and school activities.

Further allege that at all times mentioned herein said use of said parcel has been open and notorious, and without any restraint whatsoever.

Further allege that at all times mentioned herein Plaintiff knows and is aware no resident or property owner in San Marino has suffered any damages by reason of depreciation in property values, because of said use of said parcel.

That use by said school children is limited to a short morning recess, not exceeding thirty minutes, a lunch period, not exceeding forty minutes, and brief period after school, during the school year, Monday through Friday, only.

That at all times mentioned herein, Plaintiffs knew that said "Principal Property" contained two acres, more or less, and that the recreational and parking area contained less than two acres, considering the area occupied by the Church, School and Rectory.

That at all times mentioned herein Plaintiffs knew that the State Board of Education of the State of California has recommended a minimum of eight acres for elementary schools, containing six grades; and

That said Parochial School conducted by Defendants contains eight grades.

That at all times mentioned herein, Plaintiffs knew that Defendants in 1954 acquired certain residential property adjoining and immediately north of said Parcel 25; and that Defendants paid $42,500.00 in acquiring same, and in doing so Defendants created a "Buffer Area" between said Parcel 25 and any residential area North of same. That the South Boundary of said "Principal Property" is Huntington Drive, a public highway; the West Boundary Palomar Road, a public street; and the East boundary being all in C-1 Zone; and used for service station, a Medical office building and a Church with School.

V.

Further answering said paragraphs VIII, XI, and XII, allege that at all times mentioned herein Plaintiff knew that a continued increase in attendance in churches of all denominations has been a fact throughout the entire United States and San Marino in particular.

That in 1939 the total number of parishioners attending said "Church" was 150, and now said number exceeds 3,000.

That in 1950, 200 children attended said school and now said attendance exceeds 450.

That said "Church" has accommodations for 720 persons, and that masses are said on every Sunday morning at 7-8-9-10-11 and 12 o'clock.

That at all times mentioned herein Plaintiffs knew that a majority of said parishioners resided in San Marino,

and that a majority drive to and from church by automobile.

That at all times mentioned herein Plaintiff was and is aware that without the use of said parcel 25, some of said parishioners attending said church, would have to park their automobiles south of Huntington Drive, and would have to cross said Huntington, at personal risk and danger to their lives. That Plaintiff knows there is not sufficient space for parking of automobiles on the public streets within safe walking distance of said Church, North of Huntington Drive.

That at all times mentioned herein, Plaintiff knew and is aware that said school children do not have sufficient or adequate area for recreational and school activities without use of said Parcel 25.

VI.

Answering Paragraph XIII allege that Plaintiff has an adequate and speedy remedy under existing criminal laws, and may prosecute any violations of same. Deny that Defendants have violated any use limitations of said Parcel 25; and

Allege Section 23.53 of the San Marino City Code applies only to buildings or structures, and any use in connection therewith

Deny said Section applies to uses complained of herein.

VII.

Answering Paragraphs XIV, XV and XVI, deny that said use constitutes a public nuisance; deny that said use is a nuisance; deny that said use adversely affects the public health, safety, welfare and morals of said community.

VIII.

That by reason of said foregoing facts and circumstances, and said unrestrained use of said Parcel 25, Plaintiff is not entitled to any relief.

That any restraint by this court at this time would inflict unnecessary injury to said parishioners and school children and would invade private property beyond reasonable needs.

As a Further and Second Defense Defendants Allege:

I.

That in January 1950 they applied for a limited variance, as to surface use only, as to said Parcel 25, that same was denied in August 1950.

That in August 1950 Defendants obtained a Permit to build a new Rectory on said "Principal Property", and later, in September 1956, said permit was revoked, and thereafter Plaintiff filed a Complaint for Declaratory Relief, Pasadena No. C-5082, alleging that said Permit was revoked because said parties disagreed as to the interpretation of certain portions of the San Marino Municipal Code, all of which Defendants denied in answer filed therein.

Further Defendants allege that they filed Cross-Complaint in said action No. Pasadena C-5082 seeking a Writ of Mandate as to the denial of said variance.

That after hearing said application for Mandamus was denied and interlocutory findings of fact and conclusions of Law were made and entered in August 1957.

That by stipulation right of Appeal from said Interlocutory Order, is preserved and not waived.

That thereafter and in December 1957 Plaintiff filed a Supplemental Complaint in Pasadena, No. C-5682 alleging that Plaintiff had amended Section 23.14 of the San Marino City Code relating to C-1 zone uses, whereby it prohibited construction of residential or other use permitted in an R-1 zone in or on any C-1 zone.

Allege that Defendants answered such Legislation is invalid insofar as Defendants are concerned, because it is an attempt to give retroactive effect to a Permit which was issued before adopion of said amendment and that said Permit was revoked without just cause.

That Plaintiff has on numerous and divers occasions, prior to denying Defendants application for variance, granted other Applications for Variance, including some filed by Churches.

That by reason of said rulings, denials, legislative and administrative acts Plaintiff has unreasonably discriminated against Defendants.

That such acts as set forth herein are unreasonable and not necessary to promote the public welfare.

That such acts have inflicted unnecessary injury on said parishioners—in that they will be unable to park elsewhere, because of inadequate parking, and that crossing of Huntington Drive will be hazardous and dangerous to life and person.

As a further and third defense allege:

I.

Allege that at all times mentioned in Paragraphs I, IV, V, VI, VII, VIII of said Answer, Plaintiff knew that said parishioners and school children were using said Parcel 25. That said Plaintiff failed to restrain said use. That Plaintiff at all times mentioned herein knew

that said parishioners and school children relied on the fact that no restraint on said use was made, and by reason of said fact have become accustomed to said use and any restraint at this time would, in justice and equity, inflict unnecessary injury on said Parishioners and school children and would invade private property beyond needs of the community.

II.

That any restraint at this time would not be reasonably related to the public health, safety, morals, or general welfare of said community, in view of all the facts and circumstances alleged and set forth herein and in each and all of the separate paragraphs of the entire Answer.

Wherefore, Defendants Pray:

1. That Complaint be dismissed.

2. For such other and further relief as to the Court may seem proper in the premises.

s/ C. M. Castruccio,
Attorney for Defendants.

(Points and Authorities on file but omitted herefrom.)

APPENDIX D.

Reporter's Transcript, Case No. C-5682, page 27, lines 4 to 16; page 34, line 7, to page 35, line 4 and page 38, lines 10 to 25.

The Court: While it is true in every zoning case the factual situation, as the Court has said, is different. Are not the basic rules about one certain point and the procedure by which certain points are raised uniformly the same in all cases. What was it, Wilkins v. San Bernardino, was that an appeal from a refusal to grant a variance, or an appeal from the trial court decision that applied?

Mr. Dunlap: I think that was a rezoning matter, your Honor. I am not certain. That was a case where the property owner had it built up in himself.

The Court: I know the facts are not the same.

Mr. Castruccio: But that is where he deliberately after the—

* * *

The Court: Then, aren't you back to the position the Court raised a minute ago? Don't you stand or fall on your argument of whether the City can validly legislate a church or school out of an R-1 zone here?

Mr. Castruccio: That is not the point here, your Honor. I am sorry. I don't agree with your Honor that, that is the point.

The Court: Can you reach any other conclusion, carrying that to the extreme, that you either stand on the question whether the Court can, or whether the City can legislate a church or a school out of an R-1 zone?

Mr. Castruccio: I don't think that is the question.

here, your Honor. The question is, there is a church and school here.

The Court: The church and school, however, are in the C-1 zone, and saying that is where they belong and can't go out of C-1, there is no church and school in the R-1 zone.

Mr. Castruccio: That is the fact, and those are the facts here. Now, all we are asking for is a reasonable use limited to the specific items that are contained in our application, and, therefore, it brings the question up if they are opposing it, is there any evidence to sustain their opposition.

* * *

The Court: If it was owned by a commercial owner it would be a restriction on a commercial owner. Suppose that were a private school conducted by Mr. John Jones for profit?

Mr. Castruccio: If it is a school they are in the same category we are in.

The Court: Regardless of whether it is a charitable institution, or run by a church?

Mr. Castruccio: Absolutely, yes.

The Court: But if it is a commercial playground or enterprise for caring for— would you go so far as to say if it were a child care center it would be in the same category your client is in?

Mr. Castruccio: Naturally, they are in the same category. Anything that is in the nature of education or religion is distinguished.